IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 243 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF JIVANJI GOPALJI CONTRACTOR

Versus

KAIKHUSHRU JAMSEDJI DUBASH THRO' BAI KHORSED K DUBASH

Appearance:

1. Second Appeal No. 243 of 1979

MR AVINASH K MANKAD for Petitioners No. 1-1/8

MR. S.C. SHAH FOR MR. S.N. SHELAT for Respondent Nos. 5 & 9

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 12/12/2001

ORAL JUDGEMENT

1. Jivanji Gopalji Contractor-original plaintiff since deceased through his heirs and legal

representatives has filed this Second Appeal under Section 100 of the Civil Procedure Code against the judgement and decree dated 28.12.1978 passed by the District Judge, Valsad at Navsari in Regular Civil Appeal No. 22 of 1976. The learned Judge was pleased to dismiss the appeal and confirm the judgement and decree dated 29.1.1976 passed by the Civil Judge (J.D.), Pardi, in Regular Civil Suit No. 56 of 1957 by which the learned Judge was pleased to dismiss the Suit of the original plaintiff.

2.1 The facts giving rise to this appeal are as under:

2.2 There is an immovable property comprising of agricultural lands along with the structures standing thereon. This property hereinafter referred to as the `Suit property' known as Bage Iranshah is comprising several survey numbers of village Udwada, taluka Pardi, Dist. Valsad. The agricultural land comprised in the suit property admeasures nearly 150 acres. There are buildings also on the land. The suit property originally belonged to Kaikhushru Jamshedji Dubash. He entered into an agreement with five persons including the plaintiff for the sale of the suit property. The agreement in this behalf was executed between the parties to the agreement on 4.2.1954 at Exh. 209. The consideration was Rs. 2,00,000/-. The purchasers had paid Rs. 10,000/- as deposit or money on the execution of the agreement and the balance was to be paid by various instalments. The possession of the suit property was to be delivered to the purchasers within four days of the execution. The earnest money of Rs. 10,000/- was paid and the possession of the suit property was delivered according to the terms of the agreement. The original plaintiff came out with a case that he had learnt from his co-purchasers that they had released their rights in respect of the suit property and structures thereon in favour of defendant No. 1 without plaintiff's consent and authority and in collusion with them. The plaintiff also alleged that respondent Nos. 2 and 3 who styled themselves as agents of defendant No. 1 were obstructing the plaintiff in his management of the suit property. Defendant No. Mohan Gulab was joined as party because defendant Nos. 2 and 3 had sold grass of the suit land to him. It was further alleged that the plaintiff also alleged that defendant No. 1 had cut the grass and prepared bundles. He also alleged that the defendant refused to tender the share of the plaintiff and hence he filed the suit. The plaintiff sought relief for a declaration that the plaintiff was entitled to 1/5th

share in the Bage Iranshah including the structure thereon and also in its produce. He also sought perpetual injunction against defendant Nos. 1 to 4 for restraining them from entering the suit lands and cutting grass therefrom. The suit was originally filed against four defendants who are respondent Nos. 1 to 4 respectively. The plaintiff also filed an application for interim injunction on the day the suit was filed. Ex-parte ad-interim injunction was given. Defendant Nos. 1 and 2 resisted both the suit and application for interim injunction.

2.2 It was through defendant No. 2 that defendant No. 1 was acting. Defendant No. 1 was acting as power of attorney holder. The reply filed by defendant No. 1 against the application for interim injunction is at Exh. 18. The written statement filed by them to the plaint is at Exh. 58. The contentions raised in both these documents were more or less common. It was admitted that the agreement for sale was executed. However, it was denied that the plaintiff had contributed anything towards the earnest money paid. It was submitted that the possession was delivered but it was stated that the possession was delivered to the purchasers other than the plaintiff. The main person amongst them was Ali Mohmed. It was submitted that they put up a case that on or about 9.8.1956, those purchasers being not able to fulfil the terms of the contract has rescinded the contract and delivered back the possession of the suit property to defendant No. 1 on or about 13.8.1956. Since then the possession was with defendant No. 1 and defendant No. 2 was the custodian of defendant No. 1. The application for ad-interim injunction was ultimately dismissed on 23.1.1958 and the ad-interim injunction ex-parte granted was vacated.

2.3 Being aggrieved and dissatisfied with the aforesaid order, an appeal was filed by the plaintiff in the District Court. It was submitted that the appeal was ultimately withdrawn by the plaintiff.

2.4 During the pendency of the Suit, defendant No. 1 Kaikhsaru Jamshedji Dubash died on 8.7.1959 at Bombay. the plaintiff made an application Exh. 114 for bringing heirs and legal representatives of the deceased defendant No. 1 on record. The widow of deceased defendant No. 1 was named as his sole heir and legal representative. By order passed on 19.11.1959, the trial court brought the widow of the deceased on record as the heir and legal representative of the deceased. The widow of the deceased, Kharshedbai, was then living in the United

States of America. She filed her written statement at Exh. 121 through her advocate on 24.12.1959. She adopted the written statement which was filed by her deceased husband. However, she added that deceased defendant No. 1 had in fact created a public trust on 12.12.1958 at Exh. 223 in respect of the suit property during his life time and that the said public trust was registered under the Bombay Public Trust Act. She disowned any interest in the said property. She also disowned any part in the management of the suit property. On that basis she pleaded that she was not the legal representative of defendant No. 1 in respect of the suit property and so she was not a necessary party. She also contended that the suit had abated as the trustees of the trust were not brought on record within the period allowed by law even though the plaintiff was aware of the trust created by deceased defendant No. 1.

2.5 The issues were already framed earlier on 19.3.1959 at Exh. 105. Thereafter, additional issues were added in view of written statement Exh. 121.

2.6 On 21.1.1960, the plaintiff gave application Exh. 124 to bring on record two persons averring that they were the trustees of the trust created by deceased defendant No. 1 and also for condoning the delay. The plaintiff thereafter gave another application on 4.2.1960 Exh. 126 to add one more person as the legal representative of deceased defendant No. 1 and prayed that he be allowed to amend application Exh. 124. The trial court by its order dated 20.2.1960 rejected application Exh. 126 and thereafter application Exh. 124 was also rejected by the trial court by its order dated 26.2.1960.

2.7 Being aggrieved and dissatisfied with the aforesaid orders, the plaintiff filed Revision Application before this court being Civil Revision Application No. 548 of 1960 which was also rejected by this court on 10.10.1963.

2.8 After rejection of the said Revision Application filed by the plaintiff, the court proceeded to decide the additional issues framed on the basis of the written statement filed by the widow of deceased defendant No. 1 as preliminary issue. Those issues were issue Nos. 10 to 14. The trial court by its judgement and order dated 5.3.1964 decided those issues . The learned judge has found that Bai Khurshed the widow of deceased defendant No. 1 was not a necessary party. The learned judge has also found that deceased defendant No. 1 had created a

public trust in respect of the suit property. The learned trial judge has further found that the trustees of the said trust were really the legal representatives of deceased defendant No. 1 and as such necessary parties. The learned trial judge has held that the suit had abated as the trustees were not joined as parties within the time prescribed by law. On the findings so recorded, the learned trial judge dismissed the plaintiff's suit.

2.9 Being aggrieved and dissatisfied with the aforesaid order, the plaintiff preferred an appeal to the District Court being Regular Civil Appeal No. 78 of 1965 which was dismissed.

2.10 The plaintiff thereafter preferred Second Appeal before this court being Second Appeal No. 521 of 1968 which was decided on 21.2.1974 by this court (Coram: A.A. Dave, J). This court by its judgement and order dated 21.2.1974 considered all the facts which I have set out earlier. On pages 13 and 14 of the judgement the court observed thus:

"In any case, once Bai Khurshed was brought on record as the legal representative of the deceased defendant No. 1 the suit could not be said to have abated. If the court ultimately found that Bai Khurshed was not the only legal representative of the deceased or that the deceased had made a valid trust under which the suit properties vested in the trustees who were not made parties to the suit, no decree could be passed in favour of the plaintiff and it would be open to the court to dismiss the suit on merits. Naturally the court would not be in a position to pass an effective decree in the absence of parties before it. In the light of the additional issues framed by it, the court, therefore, should have directed Bai Khurshed to lead evidence in support of her say that a valid trust was created by her deceased husband and that the suit properties had vested in the trustees named by her. But the court was not right in dismissing the suit at that stage on the ground that it had abated for non-joinder of all legal representatives of the deceased.

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In the result, the appeal succeeds. The appeal is allowed. The judgement and decree passed by the

learned District Judge, Bulsar at Navsari dismissing the appeal before him and confirming the judgement and decree passed by the learned trial judge are set aside and the plaintiff's suit is restored on file. Papers are sent back to the trial court with a direction to proceed further according to law in the light of the observations made above. The learned trial judge is directed to give an opportunity to both the parties to lead oral as well as documentary evidence in regard to the proof of the additional issues framed by the court."

2.11 As per the order of this court the suit proceeded. On 31.7.1974, the plaintiff gave the application Exh. 153 for joining the defendants Nos. 5 to 9 as additional defendants. In this application it has been stated by the plaintiff that pending the proceeding of the suit, the legal representatives of the deceased defendant No. 1 sold the suit property to one Jamnadas Nagardas who in turn sold the same to the additional defendants. They were therefore sought to be joined as parties to the suit. That application was allowed and the defendant Nos. 5 to 9 were brought on record. Defendant Nos. 5 and 9 filed their written statement at Exh. 181. They denied that the plaintiff was in possession of the suit property at the date of the suit or at any time before that. They pleaded that they had purchased a part of the suit property from the rightful person namely the Charity Trust to the knowledge of the plaintiff for valuable consideration and without notice of the alleged claim of the plaintiff. The trial proceeded without any more additional issues framed. The plaintiff examined three witnesses including himself. The evidence adduced by him covered all the issues. On the other side, one witness was examined. He is one of the trustees of the trust created by deceased defendant No. 1 in respect of the suit property. The learned Civil Judge decided the suit on preliminary issues which were issue Nos. 10 to 14. The issues 10 to 14 are reproduced as under:-

"Issue No. 10 - Whether Bai Khurshed Kekobad is not a necessary party in the present suit as contended by her in her written statement Exh. 121.?

Issue No. 11 - Whether the defendant No. 1 Kaikhushru Dubash had created a public trust of the suit properties? If so,

Issue No. 12 - Whether the trustees are necessary parties in the present suit? If so,

Issue No. 13 - Whether the present suit abates on the ground that the trustees are not joined as the necessary parties within the period prescribed by law?

Issue No. 14 - ,What order and decree?"

2.12 The learned Civil Judge has found that the deceased defendant No. 1 has created a public trust in respect of the suit properties. The deed by which the trust is created is at Exh. 222. It is a registered deed dated 15.4.1957. The proof regarding the same is given by one of the trustees. In all four trustees are named in the trust deed. One of them is Khushadbanu the widow of the deceased defendant No. 1. The learned Civil Judge has found that the trustees named in the trust deed Exh. 222 were the legal representatives of the deceased defendant No. 1 representing the estate of the deceased in so far as the suit properties were concerned. The learned Civil Judge has found that Khurshedbanu being of the trustees named in the trust was a necessary party and accordingly, he has recorded his finding on issue No. 10 in the negative. However, the learned Civil Judge has found that all the trustees were necessary parties as they jointly represented the estate of the deceased in so far as the suit properties were concerned. The learned Civil Judge accordingly found issue No. 12 in the affirmative. The learned Civil Judge relying upon Order 31 Rule 2 and Order 22 Rule 4 of the Civil Procedure Code, held that the suit abated on the ground that the trustees were not joined as parties within the time prescribed by law. Accordingly, issue No. 13 has been found in the affirmative. Consequently, the suit came to be dismissed as per the findings recorded on issue No. 14.

2.13 Being aggrieved and dissatisfied with the aforesaid judgement of the learned Civil Judge, the appellant (original plaintiff) has preferred appeal being Regular Civil Appeal No. 22 of 1976 before the learned District Judge, Valsad at Navsari. The learned District Judge by his judgement and decree dated 28.12.1978 was pleased to dismiss the appeal and confirm the judgement and decree of the trial court on preliminary issues. As regards other issues, on merits of the matter also the appellant plaintiff contended before the District Court that the plaintiff is entitled to declaration and injunction as prayed for in the plaint. After

considering the evidence on record, the learned District Judge, Valsad, gave his findings and held that the plaintiff was not in possession of the suit properties on the date of the suit or at any time prior to the date of the suit in pursuance of the agreement for sale. So, there was no question of protecting his possession. Therefore, the learned District Judge held that the suit was liable to be dismissed even on merits.

3 Being aggrieved and dissatisfied with the aforesaid judgement and order of the appellate court in Regular Civil Appeal No. 22 of 1976, the appellant original plaintiff) has filed this Second Appeal before this court. It appears that originally this Second Appeal was filed on 6.4.1979. However it appears that when the appeal was admitted by this court on 25.6.1979 only two substantial questions of law were framed. They are as under:-

"(1) Whether the findings of law recorded by the courts below on issues Nos. 10, 11, 12 and 13 are correct and sound?

(2) Whether the suit should have been dismissed in limine?

3.1 From the record of the case it appears that Shri Jivanji Gopalji Contractor-appellant (original plaintiff) has died and his heirs and legal representatives have been joined by order of this court in Civil Application No. 2427 of 1981.

3.2 Respondent No. 1 Kaikhushru Jamsedji Dubash, respondent No. 3 Babu Harjivwan Tanna, respondent No. 4 Mohan Gulab, respondent No. 7 Durlabhbhai Hirubhai Patel, and respondent No. 8 Lallubhai Jogibhai Patel have already been service by public notice issued in the newspaper. From the record it appears that original respondent No. 2 Dhanjishaw B. Batliwala has been deleted by order of this court dated 15.11.1979. Notice to respondent No. 6 Namlabhai Bhanabhai Patel is served. For respondent No. 5 Ratilal Durlabhbhai Gandhi and respondent No. 9 Maganlal Gopalji Gandhi Mr. S.N. Shelat with Mr. Suresh Shah, learned counsel, appeared.

3.3 Today Mr. Avinash Mankad, learned advocate for the appellant, has filed application dated 26.7.1993 in which he has stated that he may be allowed to delete respondent Nos. 3, 4 and 9 accordingly. Accordingly, they are allowed to be deleted. Mr. Shah, learned advocate for respondent Nos. 5 and 9 states that

respondent No. 9 has already died on 9.7.1993 and the appellant has not made effort to bring heirs of respondent 9 on record. The fact was known to the appellant When this court (Coram: A.N. Divecha, J) passed order dated 14.7.1993. In view of subsequent development my learned brother Mr. Justice R.P. Dholakia has passed order dated 9.11.2001 stating that the appeal qua respondent No. 9 stands abated.

4. Mr. Avinash K. Mankad, learned counsel for the appellant, has addressed me at length and tried to assail the findings of the learned judge. One of his contentions was that the findings of the learned District Judge as well as the learned trial court is inconsistent with the order of this court in Second Appeal No. 521 of 1968. Secondly he stated that in any view of the matter the finding of the trial court on issue Nos. 10, 11, 13 and 14 is clearly erroneous and contrary to the record of the case. He further submitted that the confirmation of the appellate court on the said issues is also clearly erroneous on the ground that the same is contrary to the record of the case.

4.1 On the other hand Mr. S.C. Shah for Mr. S.N. Shelat for the respondents has tried to support the finding of the learned trial judge as well as the appellate judge in this behalf. He submitted that both the learned trial judge as well as the appellate judge has considered the judgement and decree dated 21.2.1974 passed by this court (Coram: A.A. Dave, J) and followed the binding decision of this court while dismissing the suit and the appeal. Both the learned judges have considered the evidence on record.

4.2 The learned counsel has relied on the decision of the Hon'ble Supreme Court in the case of KONDIBA DAGADU KADAM VS. SAVITRIBAI SOPAN GUJAR AND OTHERS (1999) 3 SCC 722 in which on pages Nos. 724-725 at paras 4 and 5 the Hon'ble Supreme Court has observed thus:

"para 4 - It has been noticed time and again that without insisting for the statement of such a substantial question of law in the memorandum of appeal and formulating the same at the time of admission, the High Courts have been issuing notices and generally deciding the second appeals without adhering to the procedure prescribed under Section 100 of the Code of Civil Procedure. It has further been found in a number of cases that no efforts are made to distinguish between a question of law and a substantial question of

law. In exercise of the powers under this section the findings of the fact of the first appellate court are found to have been disturbed. It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigation. Being a substantive statutory right, it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the Section must be strictly fulfilled before a second appeal can be maintained and no court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section.....

Para 5 - It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in Second Appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in Second Appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court or was based upon inadmissible evidence or arrived at without evidence."

CONCLUSION:

5. I have gone through the record of the case. I have considered the submissions made by the learned counsel for the appellant as well as the respondents. In this case original defendant No. 1 created the trust. The said trust was created on 12.12.1958 and the trust

deed has been produced at Exh. 222 and Exh. 223. The trust was registered before the Charity Commissioner at Bombay on 12.12.1958. The original certificate issued by the Deputy Charity Commissioner Greater Bombay Region, Bombay is produced at Exh. 222. It is also stated that after formation of Gujarat State, it was registered with the Assistant Charity Commissioner, Baroda Region. The original certificate dated 22.4.1964 issued by the Assistant Charity Commissioner, Baroda Region is at Exh. 224. It is stated that five persons connected with the trust deed had signed the trust deed. Those persons included the deceased defendant No. 1, the settler of the trust. The trust deed bears the signatures of five persons one after another. The first is that of the deceased defendant No. 1 the settler of the trust. Then comes the signature of the witness himself and then of other three trustees. From the record it appears that it was the deceased defendant No. 1 who had created the trust of his property, known as Bage Iranshah situated at Udwada and that the trust deed in that behalf was executed and registered. The original trust deed is admitted in evidence by the court considering that sufficient proof for its execution was given. It was allowed to be admitted in evidence without any objection from the plaintiff's side. Again in the cross-examination of the witness not a word has been asked to the witness about the document at Exh. 222. In fact, the witness was asked to identify the signature on a document signed by the deceased defendant No. 1. That document dated 14.1.1955 is at Exh. 225. This is the document by which the deceased defendant No. 1 has put on record that M/s. Hasan Baxi and Company has put in vacant possession of the suit property. This had a reference to the agreement for sale between the deceased defendant on one hand and Abdul Kadar and 4 others including the plaintiff on the other hand. There was no challenge made in the cross-examination of this witness Hormas Diyar about the genuineness of the trust deed at Exh. 222 or about lack of formality in respect of execution thereof. In view of the same, the learned trial judge as well as the appellate court has rightly decided that Bai Khursed Kekobad is not a necessary party as contained in the written statement at Exh. 121.

5.1 In the light of the above, both the trial judge as well as the appellate judge has rightly rejected the contention of the appellant in this behalf. The trial court as well as the appellate court has rightly rejected the contention of the plaintiff that trust to be declared invalid. In fact it would be hardly open for the plaintiff to contend again in this behalf. The courts

below held that Bai Khorsed K. Dubash, respondent No. 1 had no interest in the property as she was not a necessary party. She was not even managing the suit property and she was staying in abroad and she is not interested with the trust. The trial court rejected the application requesting the court to permit to bring two persons as trustees of deceased defendant No. 1 and also another person as the legal representatives of deceased defendant No. 1. The learned judge has referred this in the judgement which I have referred earlier. In view of the findings of this court, the court below was right in holding that the suit was abated.

5.2 Though attempt has been made by Mr. Mankad, learned advocate for the appellant that both the trial court and the appellate court have not considered the observations made by this court in Second Appeal No. 521 of 1968.

5.2A I have considered the submissions of the learned advocate for the appellant. In fact, I have quoted earlier the observations of this court in Second Appeal No. 521 of 1968 and the learned trial judge has considered these aspects and given his findings and therefore the findings of the learned trial judge are consistent with the earlier observations of this court. There is no inconsistency in this behalf.

5.3 I have gone through the record of the case and in fact I quoted the relevant observations of the learned judge and the entire judgement was considered. In fact whatever infirmity has been suggested by this court, the trial court and the appellate court have considered the same and thereafter necessary findings have been arrived at. In my view the trial court and the appellate court have considered the arguments and given the findings in the light of the decision of this court. I, therefore, find no infirmity in the order of the trial court and the appellate court.

5.3A I have considered the entire evidence on record. I have also considered the judgement of the Hon'ble Supreme Court in the case of KONDIBA DAGADU KADAM VS. SAVITRIBAI SOPAN GUJAR AND OTHERS (supra). The appeal raises only question of fact. There is no question of law involved in this behalf. In fact the appeal does not raise any substantial question of law and therefore the appeal is not maintainable. Even on merits of the matter, the learned trial judge has considered all the aspects of the matter and dismissed the suit. There is no infirmity in the order of the learned trial judge and

the appellate judge. The appeal is therefore required to be dismissed. The decree of the learned appellate judge in Regular Civil Appeal No. 22 of 1976 is confirmed.

5.4 In the light of the above observations, this Second Appeal is dismissed with no order as to costs.

(K.M. MEHTA, J)

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